Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-~~197~~ 97-192

To: The Commission

COMMENTS OF THE NATIONAL LEAGUE OF CITIES AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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SUMMARY

NLC and NATOA share the Commission's desire to provide guidance to local governments and industry concerning the Commission's authority under Section 332(c)(7)(B)(iv)-(v). We are disappointed, however, that many of the proposals in the NPRM suggest a lack of appreciation of the truly limited scope of authority Congress gave to the Commission.

The language of Section 332(c)(7), as well as its legislative history, leave no doubt that (1) the Commission's jurisdiction is quite narrow and non-exclusive; (2) the courts' jurisdiction broadly encompasses all disputes under Section 332(c)(7), with courts enjoying exclusive jurisdiction over all disputes save those involving RF emission compliance; and (3) Congress expected the vast majority of disputes under the provision to be resolved by the courts, not the Commission.

The NPRM's suggestion that "final action" does not require a wireless provider to exhaust all local administrative remedies before seeking FCC review is directly contrary to the Conference Report, which makes clear that a provider is absolved only from exhausting its state court remedies. A local government's decision can in no sense be considered final until the local body responsible for such a final determination has had the opportunity to pass on the matter. Cf. 47 CFR § 1.115(k).

The courts, not the FCC, have exclusive jurisdiction to determine whether a local government has failed to act in a reasonable period of time. Moreover, the only relevant time

frame for comparison in making such a determination is not any national average, but the time frame for similar requests in the particular community at issue. Because courts are far better situated than the FCC to resolve such community-specific facts, "failure to act" disputes should be left to the courts.

The NPRM's proposal to review local decisions "only partially" based on RF emissions and to preempt "that portion" of the decision based on RF emissions is misguided. As an initial matter, the proposal improperly rests entirely on the single word, "indirectly," in the Conference Report, a non-statutory term entitled to no more weight than any other word or phrase in the Conference Report and which cannot be read to expand FCC jurisdiction without doing violence to Congress' express intent to "prevent Commission preemption" and "preserve" local zoning authority in all but very "limited" circumstances.

Moreover, the "partial" preemption proposal would expose local governments, wireless providers and the FCC to the wasteful expense of multiple proceedings before a court and the FCC concerning the same local decision. Such resource expenditure would be needless since (1) the court, unlike the FCC, would have jurisdiction over the entire matter; and (2) the FCC in most cases could provide no effective relief, since it could not preempt the result of a decision -- denial of a permit -- where the decision was based both on RF emissions and other factors outside the FCC's limited jurisdiction under subparagraph (iv). Accordingly, the best approach would be for the FCC to confine

itself to reviewing decisions based solely on RF emissions and to provide its expert views on RF emission issues to the court in proceedings where RF emission is but one of the bases for the local decision.

The NPRM proposal to review local decisions that are not on their face based on RF emissions would improperly undermine the strict jurisdictional boundary between courts and the FCC under Section 332(c)(7) and invade the courts' exclusive jurisdiction under subparagraph (iii) to weigh the substantiality of the evidence before the local government. In addition, the proposal would embroil the FCC in local fact disputes that courts are in a far better position to resolve -- in terms not only of experience and fact-finding mechanisms, but also access to inherently local witnesses and other evidence.

Moreover, the NPRM's proposal to "look behind" local zoning decisions would pose difficult, if not insurmountable, federalism, due process and First Amendment problems. And there is absolutely no reason for the FCC to enter this factual, legal and constitutional thicket: Where in fact a local zoning decision contains "no formal justification," it would violate the subparagraph (iii) requirements that a decision must be in writing and based on substantial evidence -- a conclusion that courts, exercising their exclusive jurisdiction under subparagraph (iii), have not been hesitant to reach. The Commission should therefore restrict itself to reviewing decisions that on their face are based on RF emissions.

With regard to the NPRM proposals concerning providers' demonstration of RF compliance, the "more detailed" showing set forth in paragraphs 144 and 146 of the NPRM is the absolute minimum that local governments should be allowed to demand. Given that the FCC lacks the resources effectively to monitor RF compliance itself, however, we urge the Commission to join with local governments to develop an RF compliance monitoring mechanism that more effectively responds to the public's RF safety concerns.

Finally, in proceedings before the FCC under subparagraphs (iv)-(v), the burden should be on the wireless provider, not the local government, to demonstrate compliance with RF standards. As an initial matter, compliance with FCC RF standards is a jurisdictional perquisite to FCC jurisdiction under paragraph (iv), and the FCC cannot "presume" that perquisite away. Moreover, the burden of proof should be placed on the party with the best access to the evidence, and in the case of RF compliance, that is clearly the wireless provider, not the local government. Any other approach would transform the process into a shell game in which the wireless provider is always the winner, and adequate assurance of public safety is the loser.

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OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

The National League of Cities ("NLC") and the National Association of Telecommunications Officers and Advisors ("NATOA") submit these comments in response to the Notice of Proposed Rulemaking, released August 25, 1997, in the above-captioned proceeding ("NPRM").

NLC membership comprises more than 1400 municipalities across the nation. The NLC is the nation's oldest and largest national organization representing the interests of municipal governments. NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer telecommunications policy for the nation's local governments. Because many of the Commission's proposals in the NPRM, if adopted, would directly infringe upon the authority of NLC and NATOA members to exercise police powers concerning public safety, land use and zoning that have been traditionally and properly entrusted to them, the NLC

and NATOA believe it essential that the Commission hear and understand the concerns of local governments in this proceeding.

INTRODUCTION

The NPRM seeks comments in two general areas: (1) what procedures the Commission might follow in acting on petitions for relief under 47 U.S.C. § 332(c)(7)(B)(iv)-(v) from state or local wireless facility siting decisions based on the environmental effects of radiofrequency (RF) emissions; and (2) proposed guidelines concerning the types of information a local government may request from wireless providers to establish compliance with FCC RF standards, as well as presumptions concerning compliance with those standards.

While the NLC and NATOA certainly agree with the Commission that guidance concerning the scope of the Commission's limited authority under Section 332(c)(7)(B)(iv)-(v) would be helpful to industry and local governments alike, NLC and NATOA find the guidance proposed in the NPRM disappointing. Many, if not most, of the proposals and tentative conclusions in the NPRM about the scope of Commission authority under Section 332(c)(7)(B)(iv)-(v) are clearly contrary to the statutory language and Congressional intent.

Moreover, many of the proposals and tentative conclusions represent unsound policy. Some would appear to embroil the Commission in factual inquiries into the motives behind the decisions of local legislative bodies. The propriety of such inquiries by any adjudicatory body is questionable. But even

assuming such inquiries are ever appropriate, they are appropriate only for courts. Courts are far better equipped than the Commission to resolve factual disputes surrounding a local zoning decision in a prompt, cost-effective and accurate manner. Indeed, courts are already doing so under the far broader authority than the Commission that Section 332(c)(7)(B)(v) gives to them.

We respectfully suggest that the Commission confine itself to reviewing local decisions that on their face are based on RF emission concerns. This approach is not only more consistent with the statute. It also has the advantage of dividing responsibility under Section 332(c)(7)(B)(v) in a way that is best suited to the respective strengths and expertise of the Commission and the courts. The Commission, of course, has expertise in RF emissions and determining whether a given wireless facility is in compliance with FCC rules concerning such emissions. The courts, on the other hand, are in a far better position than the Commission -- in terms not only of experience and fact-finding mechanisms, but also access to inherently local witnesses and other evidence -- to resolve factual disputes surrounding a particular local zoning decision in a prompt, fair and accurate manner.

With respect to the NPRM's proposals concerning the showings required for RF compliance and allocation of presumptions in proceedings concerning RF compliance, NLC and NATOA believe that the Commission must keep in mind that compliance with its RF

emission standards is a matter of public safety. When members of the public express concern about whether RF emissions from a wireless facility in the area where they live or work pose a risk to their health -- whether those concerns are expressed to local elected officials or to the Commission -- the public is entitled both to a meaningful response and to adequate assurance that their health is not at risk.

That means wireless providers should, at a minimum, be required to make the more detailed showing of compliance set forth in paragraphs 144 and 146 of the NPRM. Even that showing, however, is not likely to be sufficient in many cases. In addition, the NPRM's proposal to adopt a rebuttable presumption of compliance is misguided. As an initial matter, compliance with Commission RF standards is a statutory prerequisite to invocation of Commission jurisdiction under 47 U.S.C. §332(c)(7)(B)(iv)-(v) that cannot be "presumed" away. Moreover, when it comes to matters of public safety, surely it is not too much to ask that a wireless provider -- the party that clearly has the best access to the facilities and thus to the relevant evidence -- be required to show that its facilities do in fact comply with rules that the Commission has found necessary to protect public safety.

I. THE NPRM PROPOSALS TO PERMIT PREMATURE REVIEW OF LOCAL ZONING DECISIONS, TO "LOOK BEHIND" THE REASONS GIVEN IN LOCAL ZONING DECISIONS AND TO PREEMPT SUCH DECISIONS BASED "PARTIALLY" ON RF EMISSIONS ARE CONTRARY TO THE STATUTE AND WOULD BE COUNTERPRODUCTIVE TO THE COMMISSION'S GOALS.

A. The Scope of the FCC's Jurisdiction under Section 332(c)(7)(B)(v) Is Very Narrow and Non-exclusive.

Before turning to the specific proposals and tentative conclusions in the NPRM, we first believe it necessary to place those proposals and conclusions in the proper context -- a context that the NPRM at times appears to overlook.[1] Both the language and the legislative history of Section 332(c)(7) make abundantly clear that the Commission's jurisdiction is strictly limited, and that the vast majority of disputes arising under that provision will lie in the "exclusive jurisdiction" of the courts.[2]

As the Chief of the Wireless Telecommunications Bureau herself recognized, "legal jurisdiction to determine whether any state or local government action violates Section 332(c)(7) of

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[1] We note, for instance, that the NPRM devotes a few paragraphs to discussing Sections 332(c)(3) and 253 of the Act. NPRM at ¶¶ 124-127. The purpose of the NPRM's discussion of those provisions is unclear. One thing is clear: Neither Section 332(c)(3) nor Section 253 -- nor any other provision of the Communications Act other than Section 332(c)(7)(B) -- provides the Commission (or the courts) with any jurisdiction to review or preempt any local decision "regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A).

[2] H.Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996) ("Conference Report"). Thus, the NPRM's suggestion (at ¶ 117) that the Commission "anticipate[s] being called upon more frequently to review petitions" under Section 332(c)(7)(B)(iv)-(v) should be tempered with the understanding that the courts, not the Commission, should be responsible for resolving the bulk of disputes arising under Section 332(c)(7)(B)(v).

the Communications Act, other than actions which may constitute unlawful regulation based on the environmental effects of radiofrequency emissions, is reserved by statute to the courts."[3] This conclusion is inescapable from the language and structure of the provision.

First, Section 332(c)(7)(A) provides that, except as provided in Section 332(c)(7), "nothing" in the entire Communications Act -- which is of course the Commission's only source of jurisdiction -- limits or affects local authority over decisions relating to the placement construction or modification of personal wireless facilities.

Second, Section 332(c)(7)(B)(v) gives courts jurisdiction over all disputes under Section 332(c)(7)(B), including those relating to RF emissions.[4]

Third, Section 332(c)(7)(B)(v) gives courts "exclusive jurisdiction" over all disputes under Section 332(c)(7)(B) other than those based on RF emissions within the meaning of subparagraph (iv). Conference Report at 208.

Fourth, the Commission's jurisdiction is strictly limited to RF emission disputes falling within Section 332(c)(7)(B)(iv). And even in this narrow area, the Commission's jurisdiction is

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[3] Letter to Thomas Wheeler, CTIA, from Michelle Farquhar, Wireless Telecommunications Bureau, at 1 (released Jan. 17, 1997) ("CTIA Letter").

[4] "Any person adversely affected by any final action or failure to act by a State or local government . . . that is inconsistent with this subparagraph [i.e., paragraph (B)] may . . . commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added).

not exclusive, but rather is shared with the courts under Section 332(c)(7)(B)(v).[5]

This statutory structure leads inescapably to one conclusion: That Congress expected that the vast majority of disputes under Section 332(c)(7) to be resolved by the courts, not the Commission, and that the Commission's role was to be a very narrow one. Lest there be any doubt on this point, the Conference Report removes it:

> The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.

Id. at 207-08 (emphasis added).

With these principles in mind, we turn now to the specific tentative conclusions and proposals in the NPRM.

B. The NPRM's Interpretation of the Terms "Final Action" and "Failure to Act" Must Be Revised To Coincide With Congressional Intent.

The NPRM seeks comment on the meaning of the terms "final action" and "failure to act" in Section 332(c)(7)(B)(v). Citing the Conference Report, the NPRM suggests that "final action" does

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[5] See note 4 supra.

not require "waiting for the exhaustion of any independent remedy otherwise required" and that "for example, a wireless provider could seek relief from the Commission from an adverse action of a local zoning board or commission while its independent appeal of that denial is pending before a local zoning board of appeals." NPRM at ¶ 137.

The NPRM has misread the Conference Report. There, Congress made clear that "final action" means:

> final administrative action at the State or local government level so that a party can commence action under the subparagraph [v] rather than awaiting for the exhaustion of any independent State court remedy otherwise required.

Id. at 209 (emphasis added).

Thus, the example in the NPRM is simply wrong. A decision made by a local zoning board or commission that is subject to internal administrative appeal to a local zoning board of appeals (or, in the case of many jurisdictions, from the planning commission to the city or county council) is not a "final administrative action at the State or local government level." The Commission, of all parties, should understand that. A party cannot appeal an FCC bureau chief's decision directly to court without first seeking full Commission review (see 47 CFR § 1.115(k)), and for good reason: until or unless the Commission has had the chance to review the bureau's decision, a party is not entitled to argue to a court that the bureau's decision actually represents the Commission's resolution of the matter. So it is with local governments: A wireless provider cannot

plausibly claim to the Commission in a petition under Section 332(c)(7)(B)(v) that a zoning board or planning commission decision represents a "final action" of a local government unless the council or zoning board of appeals have first had an opportunity to pass on the matter.[6]

In fact, as the Conference Report makes clear (at 209), the only remedy a petitioner under Section 332(c)(7)(B)(v) does not have to exhaust is a "State court remedy." In other words, the Conference Report simply clarifies that "final action" does not require exhaustion of state court remedies, as had been the Commission's policy in the area of satellite earth-station preemption disputes before Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1993).

The NPRM's proposed interpretation of "failure to act" (at ¶ 138) also requires modification. As an initial matter, we note that the Commission has no jurisdiction under Section 332(c)(7)(B)(ii) and thus has no authority to make any binding interpretation of the meaning of the phrase "reasonable period of time" in that provision. Moreover, while the intent of the NPRM is not clear on this point, it at least arguably suggests that the "average length of time" taken to issue various types of permits is somehow relevant.

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[6] Cf. Willie Brown DA97-1361, Report and Order (released July 1, 1997) (petitioner under 47 CFR §25.104 satellite dish rules unsuccessfully appealed to township zoning board before petitioning the FCC).

To the extent that the NPRM is suggesting that some sort of nationwide average is relevant to the inquiry, that is incorrect. The Conference Report (at 208) states that subparagraph (ii) is not intended to give wireless providers preferential treatment in processing of requests. That means that the only relevant time frame for comparison is the time frame for similar requests in the particular community at issue. Any effort to hold local governments to a nationally-based time frame would have the impermissible effect of granting preferential treatment to wireless providers whose requests are made in communities that generally process zoning requests unrelated to wireless services less swiftly than the national average.

Because the determination of what is a "reasonable period of time" under subparagraph (ii), and thus a "failure to act" under subparagraph (v), will inevitably be based on facts and circumstances specific to the particularly community involved, and because courts have exclusive jurisdiction to interpret subparagraph (ii), the preferable course would be for the Commission to leave "failure to act" disputes to the courts. At best, the Commission can only share jurisdiction with the courts over such matters, and unlike RF emission compliance issues, courts have far more experience and fact-gathering capability than the Commission to resolve inherently fact-specific disputes about whether a local government has failed to act in a reasonable period of time within the meaning of Section 332(c)(7)(B).

C. The NPRM's Proposal To Preempt Local Decisions Based "Only Partially" on RF Emissions Is Misguided.

The NPRM seeks comment (at ¶ 139) concerning whether the Commission should entertain petitions under Section 332(c)(7)(B)(iv)-(v) from local decisions "based only partially" on RF emissions. Relying on a single phrase, "directly or indirectly," in the Conference Report, the NPRM concludes that local decisions "do not have to be based entirely" on RF emissions to be reviewable by the Commission. The NPRM then proposes to review and preempt, on a case-by-case basis, "that portion" of a local decision based on RF emissions and to permit the wireless provider to seek relief from the remainder of a local decision from a federal or state court.

This "partial preemption" proposal rests on a flawed legal premise and would expose local governments and providers alike to the needless and wasteful expense of multiple proceedings in different fora. The Commission should therefore confine itself to reviewing decisions that are based solely on the environmental effects of RF emissions. Otherwise, the Commission is likely to find its resources, as well as those of local governments and wireless providers, wastefully devoted to FCC proceedings that will serve little purpose.

The NPRM's conclusion that the Commission may review local decisions based "partially" on RF emissions rests entirely on one phrase -- "directly or indirectly" -- in the Conference Report.

But this single, brief phrase in the legislative history will not bear the weight that the NPRM seeks to place on it.

First of all, the legislative history cannot be used to expand the plain meaning of the statute. See, e.g., Blue Cross & Blue Shield of Alabama v. Weitz, 913 F.2d 1544 (11th Cir. 1990). And the language and structure of Section 332(c)(7)(B)(v) make plain that courts have general jurisdiction over all disputes arising under Section 332(c)(7)(B) (including RF emission disputes), while the Commission's jurisdiction is strictly limited to disputes that must satisfy two requirements: (1) they must "regulate the placement, construction and modification of personal wireless facilities on the basis of the environmental effects of [RF] emissions"; and (2) the facilities at issue must "comply" with FCC regulations concerning RF emissions. As explained below, as a practical matter most local zoning decisions -- even if arguably "partially" based on RF emissions -- simply will not satisfy this test.

Moreover, the NPRM's request for comment on the meaning of the single isolated word, "indirectly," in the Conference Report reflects a myopia in need of correction. The word "indirectly" nowhere appears in the statute. It is thus no more entitled to the dignity of a statutory term than any other word or phrase in the Conference Report. Moreover, by seeking comment on the meaning of a single non-statutory word in the legislative history, the NPRM has overlooked the significance of the balance of the Conference Report, which leaves no doubt that Congress

intended generally to "prevent[] Commission preemption of local and State land use decisions" and to "preserve[] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." Conference Report at 207-08 (emphasis added).

Thus, to the extent the phrase "directly or indirectly" is to be given weight at all, it is certainly entitled to no more weight than the phrases "prevent Commission preemption" and "limited circumstances." One conclusion seems clear: the term "indirectly" cannot be construed to expand Commission jurisdiction under Section 332(c)(7)(iv)-(v) without doing violence to Congress' obvious intent to prevent FCC preemption of local zoning decisions except in very limited circumstances.

The NPRM tacitly appears to recognize as much by proposing to preempt "only that portion" of a local decision "that is based on RF emissions" and to allow the parties to resolve any other Section 332(c)(7) issues in the courts.[7] But in addition to the statutory and Conference Report problems posed by this approach, the NPRM's proposal would lead to grossly inefficient resolution of disputes. It would compel local governments and wireless

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[7] NPRM at ¶ 139. The NPRM's companion suggestion that the Commission may act "in an advisory capacity" and provide its "expert opinion" on Section 332(c)(7) disputes falling outside of subparagraph (iv) likewise rests on a mistaken premise. The Commission's expertise extends only to those statutory provisions that it is entrusted to interpret and enforce. See, e.g., Cellwave Telephone Services LP v. FCC, 30 F.3d 1533, 1537 (D.C. Cir. 1994). Since the Commission has no jurisdiction to act under Section 332(c)(7)(B)(i)-(iii), it has no special expert opinion to provide courts on the meaning of those provisions.

providers to expend resources litigating disputes over the same local zoning decision simultaneously in two different fora -- the courts and the Commission -- and with the risk of inconsistent results. Since the courts, but not the Commission, would have jurisdiction over the entire dispute, judicial and administrative economy and consistency counsel that, where a local decision is based on multiple factors, disputes about such decisions should be left to the courts, at least absent compelling and unique circumstances in a particular case.

Moreover, the Commission must keep in mind that, at least in the vast majority of cases, "partial" preemption would serve no purpose. An example will illustrate the point. Suppose that a local government decision denying a permit or variance to a wireless provider sets forth multiple grounds for the decision -- aesthetics in a residential or historical area, public safety concerns over the structural integrity of the facility, and concerns over RF emissions. Even assuming that the part of the local zoning decision addressing RF concerns was inconsistent with subparagraph (iv), what could the Commission preempt? It certainly could <u>not</u> preempt the result of the local zoning decision -- to deny the requested permit or variance -- because the other grounds for denying the permit are beyond the Commission's limited jurisdiction to review, much less preempt. At most, the Commission could issue an advisory ruling that part of the rationale of the local zoning decision was inconsistent with subparagraph (iv). But until or unless a court determined,

in its exclusive jurisdiction, whether the other rationales of the local decision were inconsistent with Section 332(c)(7)(B)(i)-(iii), the local decision to deny the permit would still stand.

In these circumstances, the most appropriate role for the Commission would be to provide the court with its expert opinion on the limited issue of RF emissions rather than to multiply proceedings and expense by carrying out a separate proceeding parallel to the court proceeding. Moreover, inviting wireless providers to institute such proceedings before the Commission rather than the courts might well prove to be a disservice to the industry. Given the 30-day jurisdictional deadline in subparagraph (v) for commencing court actions, the Commission should not lull providers into turning to the Commission first for relief. Rather, the Commission should adopt policies designed to encourage providers to go to court in the first instance.

D. The NPRM Proposal To "Look Behind" Local Decisions and To Re-Weigh the Local Record Is Both Unlawful and Unnecessary.

Perhaps the most troubling aspect of the NPRM to local governments is its tentative conclusion (at ¶ 140) that the Commission has the authority to review local decisions that "appear to be based upon RF concerns but for which no formal justification is provided." Any such effort by the Commission to "look behind," and thereby to question, the candor and integrity of decisions made by local governments -- who are, it should be

pointed out, the federal government's partners in our system of federalism -- would not only be contrary to Section 332(c)(7) itself, but also pose grave constitutional questions as well. And since Section 332(c)(7)(B)(iii) clearly provides a far simpler and less intrusive means of protecting wireless providers in the hypothetical situation on which the NPRM (and the CTIA Letter) is based, there is simply no reason for the Commission to venture into such statutorily and constitutionally troubled waters.

We begin with what should be an obvious proposition: The Commission is not at liberty to redraw jurisdictional boundaries drawn by Congress. See Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374-75 (1986). As we have shown in Part I(A) above, in Section 332(c)(7), Congress sharply limited the Commission's role, giving to courts general jurisdiction over disputes arising under that provision. This jurisdictional boundary would be obliterated if, as the NPRM suggests, the Commission could unilaterally expand its own jurisdiction by looking behind any local zoning decision, conducting its own evaluation of the evidence before the local government, and then deciding what the Commission thinks the local government's true motivation was. Such an approach would open to Commission review virtually any local decision where a citizen happened to express RF concerns, in direct violation of the statute.

Moreover, Commission inquiry into whether a local government's decision was based on factors other than those set

forth in the decision would raise a host of other statutory and constitutional concerns. As the Supreme Court has repeatedly recognized, even federal courts may not strike down legislative acts based on an alleged illicit or wrongful legislative motive. See e.g., United States v. O'Brien, 391 U.S. 367, 383-84 (1968). A fortiorari, an administrative agency like the Commission should not be in the business of attempting to ascertain, much less deciding, that a local legislative body's decision was based on some motive other than that given by the local legislative body.

And even if the Commission could properly engage in such an inquiry, it would necessarily become embroiled in resolving factual disputes about who said what and the circumstances surrounding the local government decision. Due process, in turn, would require that such factual disputes be resolved through a full adjudicatory hearing. See Califano v. Yamasaki, 442 U.S. 682 (1979); Mathews v. Eldridge, 424 U.S. 319 (1976). Yet courts would be far better situated -- both in terms of access to the evidence and fact-finding apparatus -- than the Commission to resolve such factual disputes. And unlike the Commission, courts would be duty-bound under Section 332(c)(7)(B)(v) to resolve such disputes "on an expedited basis."

The NPRM's proposal to "look behind" local zoning decisions also has troubling First Amendment implications. Local governments, of course, are bound by the First Amendment. They are not in the habit of "gagging" their citizens at public hearings. Yet the NPRM proposal to look behind the reasons given

for a particular local zoning decision would put a local government in the impossible position of either gagging all local citizens who wish to express concern about RF emissions or, alternatively, exposing its ultimate decision to Commission review under Section 332(c)(7)(B)(iv).

The NPRM seems to ignore the obvious fact that the basis for local legislative decisions cannot be gleaned simply by summing up the statements made by interested parties before the local council or board. The Commission, above all, should recognize that. We assume, for instance, that the Commission would object -- and rightfully so -- to any claim that its decision was improperly based merely because a large number of parties happened to submit comments urging an improper rationale on the Commission -- a rationale that the Commission declined to adopt in its decision.

In fact, the general rule is that local ordinances are presumed lawful, and "[z]oning is a legislative function entitled to great deference." Wood Marine Service, Inc. v. City of Harahan, 858 F.2d 1061, 1066 (5th Cir. 1988). The NPRM's proposal to "look behind" local zoning decisions that are not on their face based or RF emissions would improperly stand this presumption on its head. It also is flatly inconsistent with the NPRM's proposal (at ¶ 151) to presume that wireless facilities will comply with FCC rules. Why the Commission seems, on the one hand, unwilling to presume that local governments will comply with their obligations under Section 332(c)(7), while, at the

same time, it is more than willing to presume that all wireless providers will comply with FCC RF emissions rules is (to the say the least) unexplained.

Finally, as careful analysis of the CTIA Letter hypothetical on which this NPRM proposal is based makes clear, there is simply no need whatsoever for intrusive Commission action in this area. Where there is in fact "no formal justification" for a local zoning decision concerning wireless facilities, that decision will of course be challengeable in court as violating the subparagraph (iii) requirement that decisions must be "in writing and supported by substantial evidence contained in a written record." The court, not the Commission, properly has "exclusive jurisdiction" over such a claim. Conference Report at 208. Any effort by the Commission to "look behind" such an unexplained local decision and weigh the evidence would therefore be an improper invasion of the court's exclusive jurisdiction to determine the substantiality of the evidence underlying the decision.

In fact, the CTIA Letter hypothetical, although supposedly based on the action of "a Pacific Northwest county" (CTIA Letter at 3), is virtually indistinguishable from BellSouth Mobility, Inc. v. Gwinnett County, 944 F. Supp. 923 (N.D. Ga. 1996). The BellSouth court struck down a local zoning decision that was not justified in writing and was not based on substantial evidence, noting that the only evidence in the record supporting the decision was one homeowner's concern about RF emissions, among